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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 389.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
Petitioner,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF IN BEHALF OF PETITIONER, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Claims (R. 29-31) has not yet been reported. The dissenting opinion of Chief Justice Booth, concurred in by Justice Moss, will be found on pages 31-41 of the Record.

II.

JURISDICTION.

This is on petition for certiorari to the Court of Claims under Section 3(b) of the Act of February 13,

1925, 43 Stat. L. 936, 939. The judgment was entered June 10, 1929. (R. 41.) The petition for certiorari was filed September 10, 1929. (R. 42.)

III.

STATEMENT OF THE CASE.

This case involves the claim of the petitioner, The Chesapeake and Potomac Telephone Company, against the United States, for the difference between the cost of a very large telephone switchboard furnished and installed for the War Department during the World War, and the amount realized from the parts when the switchboard was removed after the emergency need therefor had ceased. The claim was filed under the Act of Congress of March 2, 1919, (40 Stat. 1272), known as the Dent Act, after the preliminary proceedings required by that Act had been duly concluded. (R. 28, Finding XXVIII.)

From June, 1908, to February, 1917, a switchboard with a capacity of 280 lines had been sufficient to supply the telephone needs of the War Department in the District of Columbia. (R. 17, Finding VI.) Then, due in part to Mexican border troubles and Germany's declaration of its policy with respect to unrestricted submarine warfare, the telephone needs of the Department began to increase, and larger equipment was then installed and thereafter increased from time to time, by various expedients, which resulted in increased cost of operation to the Government and in a less speedy and less accurate service, until the limit to which such equipment could be expanded had been reached. (R. 17-18, Findings VII, VIII and IX.)

By November, 1917, seven months after war had been

declared by the United States, the officials of the Telephone Company foresaw and informed the officials of the War Department that the telephone requirements of the Department, due to war conditions, would exceed the maximum capacity of the type of switchboard then installed, and that it would be necessary to provide a switchboard equipment larger than any previously designed and used for even the largest private branch exchange then existing. (R. 18-19, Findings X and XI.)

No space in the War Department buildings was then available, and accordingly, the War Department thereupon erected a building, especially designed and constructed for the purpose of housing such larger switchboard equipment. This building was designed by an architect and built by a contractor, both employed by the Government. (R. 19, Finding XI.)

At that time there was in effect a General Supply Contract, made by the Secretary of the Treasury with the Telephone Company, under authority of the Act of June 17, 1910, (36 Stat. 468, 531), providing for the furnishing of telephone equipment and service to the various Government Departments and Bureaus in Washington, for the fiscal year ending June 30, 1918. This contract had been entered into on May 18, 1917, and was substantially similar to the General Supply Contract for telephone service for the previous year, which had been entered into on June 23, 1916. These contracts provided a rental of $24.00 per year for a private branch exchange switchboard, and a like rental was provided by the General Supply Contract for the fiscal year beginning July 1, 1918. (R. 13-16, Findings II, III and IV.)

The Telephone Company submitted plans to the Sec-

retary of War for the purpose of securing approval of the proposed switchboard and equipment and its layout in the proposed building with relation to the floor space before placing a final order for the construction thereof. These plans indicated the extensive character of the various parts of the equipment. The endorsements with which the plans were returned to the Telephone Company indicated approval thereof, and Arthur D. Scovell, Director of Telephones for the War Department, orally approved of the proposed switchboard and equipment. (R. 21-22, Finding XIII.)

Before beginning the installation of the new switchboard in the new building, the Telephone Company, through its proper official, informed John C. Scofield, Assistant to the Secretary of War and Chief Clerk of the War Department, and the said Arthur D. Scovell, Director of Telephones for the War Department, that the Telephone Company would expect the Government to pay the cost of the new switchboard less salvage. Mr. Scofield ranked next to the Secretary of War himself in the control of the telephone service of the Department, and had supervisory charge of the estimates and expenditures from the appropriation "Contingent expenses of the War Department." Mr. Scovell was in immediate charge of the telephone service of the War Department, which was under the general direction of Mr. Scofield. (R. 19-22, Finding XII and XIII.)

The new board was expeditiously and properly installed, in the building provided therefor by the War Department, and was accepted and used by the Department, beginning in June, 1918. The total cost to the Telephone Company of the switchboard and equipment and their installation was $401,113.34. The switchboard was of the type which is installed in a central-

office telephone exchange, and was of sufficient capacity to serve as a telephone exchange for a city of from 40,000 to 100,000 inhabitants. When fully completed, it had positions for 75 operators, and served 65 different buildings, in various localities in the District of Columbia, where the War Department's activities were housed. (R. 22-23, 28, Findings XIV and XXIX.) After the Armistice, the Department ordered portions of the board removed from time to time, and the last was removed at the end of 1920, and thereafter telephone service was provided for the War Department through the Navy Department switchboard. (R. 23, Finding XV.)

On May 19, 1919, the Telephone Company presented its claim to the War Department, based upon the proportionate cost and estimated salvage of the portion of the board which had then been ordered removed, and, as further positions were ordered removed and more accurate statements prepared, the claim was amended. The Secretary of War immediately referred the claim to the Board of Contract Adjustment, which, after hearings, disallowed the claim in its entirety on June 25, 1920, and on July 20, 1920, denied an application for a rehearing. An appeal was taken to the Secretary of War, who, on November 9, 1920, affirmed the decision of the Board. (R. 28, Finding XXVIII.)

Suit was then filed in the Court of Claims, which, by a court divided three to two, concluded that the Telephone Company was not entitled to recover and dismissed its petition. (R. 31, 41.)

In reaching this conclusion the Court, as appears from the majority opinion, (R. 29-31), held that Section 4 of the Act of June 17, 1910, gave the Secretary of the Treasury "sole authority" to make contracts

for supplies for the various departments of the Government, including telephone service, thus entirely ignoring the very large size and unusual character of the switchboard in question, the fact that the exigencies of the war required that it be secured as speedily as possible and without waiting to advertise, and that it was not, within the intent of the Act, an article "in common use by or suitable to the ordinary needs of two or more such departments or establishments."

The Court also apparently held that the supply contracts made by the Secretary of the Treasury under authority of this Act covered this switchboard, or, in other words, that the telephone company was obligated to furnish the War Department with a $400,000 specially designed switchboard for a rental of $24 a year, and then to remove it some two years later when the needs of the Department for telephone service had rapidly decreased.

The Court further held that the contract sued upon was made without authority, although it clearly appears from the findings that the telephone company, before installing the switchboard, gave notice personally to Mr. Scofield, who ranked next to the Secretary of War himself in the control of the telephone service of the Department, and also to the Director of Telephones for the Department, that the Government would be expected to pay the cost of the board less salvage, and although the Department built a building specially for the board, which it approved, accepted, and used, and although a claim for compensation was presented to the Secretary of War and by him referred to the Board of Contract Adjustment some eighteen months before the Department finally discontinued its use of the board.

Furthermore, in spite of its findings of fact as just summarized, the Court held that its findings showed no facts from which a contract was implied in fact, which is apparently based upon the erroneous view that an express promise to pay is essential to such a contract. The Court also in effect held that the Government could accept and retain all the benefits of this contract, and yet disavow all of its burdens, even though the War Department continued to use the switchboard in question after the claim for compensation therefor had come before the Secretary of War and been referred by him to the Board of Contract Adjustment, and though the Department did not finally discontinue the use of such board until some eighteen months thereafter.

A dissenting opinion (R. 31-41) was filed in the Court below by Chief Justice Booth and was concurred in by Justice Moss. Their view was that the switchboard was not contemplated or covered by the general supply contracts, that the contract sued upon was made by proper authority and was sufficiently established, and that the telephone company was entitled to recover the amount claimed in its amended petition.

IV.

SPECIFICATION OF ERRORS.

1. The Court of Claims erred in holding that, under the provisions of Section 4 of the Act of June 17, 1910, (36 Stat. 468, 531), the Secretary of the Treasury had sole authority to contract for so large and unusual a switchboard as is here involved, for the use of the War Department.

2. The Court of Claims erred in holding that the gen-

eral supply contract between the Secretary of the Treasury and the Telephone Company for the fiscal year ending June 30, 1918, and the general supply contract between the same parties for the following fiscal year covered the furnishing and installation of the switchboard in question and the compensation to be paid the Telephone Company therefor.

3. The Court of Claims erred in holding that the contract sued upon was made without authority on the part of the contracting official or officials of the War Department.

4. The Court of Claims erred in holding that the findings of the court showed no facts from which a contract could be implied in fact.

5. The Court of Claims erred in failing to hold that the findings of the court set forth facts from which a contract was implied in fact.

6. The Court of Claims erred in holding that the Government could accept, and, even after claim had been filed with the Secretary of War, retain the benefits of the contract, and yet disavow its burdens.

7. The Court of Claims erred in dismissing the claimant's petition on the findings of fact.

8. The Court of Claims erred in not entering a judgment for the claimant for the amount claimed in its amended petition, upon the facts as found by the court.

V.

SUMMARY OF ARGUMENT.

A. The switchboard here involved is not within the meaning or intent of Section 4 of the Act of June 17, 1910, giving the Secretary of the Treasury authority to advertise and contract for common or usual sup-

plies for the executive departments and other government establishments in Washington, because:

The Act, in terms, applies only "when the public exigencies do not require the immediate delivery of the article."

The Act relates only to articles "in common use by or suitable to the ordinary needs of two or more such departments or establishments."

The Act contemplates that the Secretary of the Treasury shall advertise and contract for such articles only.

The switchboard here involved was of a special and unusual size and character, was not in common use by or suitable to the ordinary needs of two or more such departments or establishments, and furthermore the urgent need therefor was such as to preclude the delay necessarily incident to advertising for bids.

B. Neither the furnishing and installation of the switchboard here involved nor the compensation to be paid the telephone company therefor are covered by the general supply contracts for telephone service, because:

Such switchboard, for the reasons above stated, was not within the meaning and intent of Section 4 of the Act of June 17, 1910, under the authority of which such contracts were made.

The rental of $24 per year provided by these contracts for a private branch exchange switchboard shows beyond any reasonable doubt that neither party thereto, at the time of execution, had in contemplation such a switchboard as is here involved or that the telephone company could be required to furnish and instal such a board, for some two and a half years' only of use, at a cost of over $400,000, for any such rental as $24 a year.

C. The special findings of fact, as found by the Court below, sufficiently establish the authority of the contracting officials of the War Department.

D. The special findings of fact, as found by the Court below, set forth facts from which a contract is implied in fact to compensate the telephone company. They show an offer by the telephone company, and approval, acceptance and use by the War Department.

E. When the War Department accepted, and, even after claim for compensation had been filed with the Secretary of War, continued to retain all of the benefits of the contract, it cannot disavow its burdens.

Conclusion. The decision of the Court of Claims was erroneous. The writ of certiorari should be granted, and the decision reviewed and reversed.

VI.

ARGUMENT.

Point A.

The switchboard here involved it not within the meaning or intent of Section 4 of the Act of June 17, 1910, giving the Secretary of the Treasury authority to advertise and contract for common or usual supplies for the executive departments and other government establishments in Washington.

This Act, the then annual legislative, executive and judicial appropriation bill, is found in 36 U. S. Stat. L. 468-531, and Section 4 thereof, (p. 531), the only portion of the Act material to this case, is as follows:

> "Sec. 4. That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other govern-

ment establishments in Washington, *when the public exigencies do not require the immediate delivery of the article,* shall be *advertised and contracted for* by the Secretary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be *a general supply committee* in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committee shall be to make, under the direction of the said Secretary, *an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties,* and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may see fit to call upon, who shall render whatever assistance they may require. The committee shall aid said Secretary in securing the proper fulfillment of the contracts for such supplies, for which purpose the said Secretary shall prescribe, and all departments comply with, rules providing for such examination and tests of the articles received as may be necessary for such purpose; in making additions to the said schedule; in opening and considering the bids, and shall perform such other similar duties as he may assign to them: *Provided, That the articles intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments;* but the said Secretary shall have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased. In all cases only one bond for the proper performance of each contract shall be required, notwithstanding that supplies for more than one department or

government establishment are included in such contract. Every purchase or drawing of such supplies from the contractor shall be immediately reported to said committee. No disbursing officer shall be a member of such committee. No department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department: *And provided further,* That *telephone service,* electric light, and power service purchased or contracted for from companies or individuals *shall be so obtained by him.*" (Italics ours.)

This Section clearly contemplates the preparation from year to year, of a general supply schedule of required miscellaneous supplies, including telephone service and equipment, for the executive departments and other government establishments in Washington, but only of such articles as are "in common use by or suitable to the ordinary needs of two or more such departments or establishments," and even then only "when the public exigencies do not require the immediate delivery of the article."

The findings of the court below show, however, that the switchboard here involved was made necessary by the unprecedented needs of the War Department for telephone service, due to the World War and existing for a comparatively short time; that the board was specially designed and constructed, and was installed in a building specially planned and built to house it; that it was of the type ordinarily used for a central telephone exchange and of sufficient capacity to have

provided telephone service for a city of from 40,000 to 100,000 population; and furthermore that it was vital that it be provided at the earliest possible moment.

Can such a switchboard find any proper place in the general supply schedule contemplated by the Act now under discussion? And especially so when the public exigency required its installation and use at the earliest possible moment, and when such a board was not only not "in common use by or suitable to the ordinary needs of two or more" government departments or establishments, but was not even in use by any one such department or establishment up to that time, nor has it ever been "suitable to the *ordinary* needs" of any such department or establishment.

And yet the Court of Claims has erroneously construed this Federal Statute as being applicable to such an article, in utter disregard of the clearly expressed purpose, meaning and intent of the Act.

Point B.

Neither the furnishing and installation of the switchboard here involved nor the compensation to be paid the telephone company therefor are covered by the general supply contracts for telephone service then in force.

Since these contracts were made by the Secretary of the Treasury under the authority of Section 4 of the Act of June 17, 1910, which we have just discussed, and since, as there pointed out, the switchboard here involved is clearly not within the meaning or intent of that Section, it necessarily follows that it is not and cannot be covered by the contracts made thereunder.

Furthermore the one of these contracts which was in force when the board was installed was entered into the month following our declaration of war and before war conditions had given any real indication of the unprecedented though temporary need for telephone service which later developed in the War Department.

The provision in this contract of a rental of $24 per year as compensation for the installation and use of a private branch exchange switchboard establishes clearly that neither party to the contract, at the time it was made, contemplated, by this provision, any such switchboard as that here involved. Certainly the telephone company did not have such a board in contemplation, nor are we willing to believe that the Secretary of the Treasury did, in spite of the contention of the Government in defense of this claim and the majority opinion of the lower court.

Point C.

The special findings of fact, as found by the Court below, sufficiently establish the authority of the contracting officials of the War Department with whom petitioner dealt.

As before stated, prior to the installation of the switchboard here involved, the telephone company submitted plans to the Secretary of War, for the purpose of securing approval of the proposed switchboard and equipment and its layout in the proposed new building with relation to the floor space; and the endorsements with which these plans were returned to the company indicated approval thereof. (R. 22, Finding XIII.) The government erected this building, which was especially designed to house the switchboard and equip-

ment. (R. 19, Finding XI.) In addition, and before beginning the installation of the new switchboard, the telephone company, through its proper official, informed the Assistant to the Secretary of War and Chief Clerk of the War Department, and also the Director of Telephones for the War Department, that the telephone company would expect the government to pay the cost of the new switchboard less salvage. The Assistant to the Secretary of War and Chief Clerk of the War Department ranked next to the Secretary of War himself in the control of the telephone service for the Department, and the Director of Telephones had immediate charge of the telephone service of the Department, under the direction of the Chief Clerk. (R. 19-20, Finding XII.) It is true that the Court below found, (R. 25, Finding XX), that the Assistant to the Secretary of War and Chief Clerk of the War Department never represented to the telephone company's representative that the Department would pay for the installation or costs of or losses on the new switchboard; but the Court there also found that he did not, prior to the installation of the board, notify the company that he would not pay for the same; and there is nowhere in the findings any statement that, at any time after the company's notice to the Assistant to the Secretary of War and Chief Clerk of the War Department and to the Director of Telephones for the War Department that the Government would be expected to pay the cost of the board less salvage, and before the completion of the installation thereof, any official of the War Department informed the company that the Department would not or did not expect to pay for the board.

As to this phase of the findings the Chief Justice of

the Court below, in his dissenting opinion (R. 37, 38) said:

> "Every responsible and authorized officer of the department was advised and fully cognizant of the emergency situation and the absolute inadequacy of the installed equipment to meet the situation. Cooperation between the plaintiff and the officers existed. The vast extent of the changes necessary was assented to. Those in authority authorized the new building and cannot escape express notice of the exact character of the switchboard to be erected therein. Mr. Scovell, in charge of the entire telephone service for the department under an appointment the legality of which is not questioned, concedes a contract to pay the cost of the board."
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> * * *
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> "Two pertinent inferences are deducible from this testimony. First, the chief clerk knew the plaintiff was not doing this extra work for nothing. Second, no protest was lodged against the claim and no indication of a lack of assent to it. It is no criticism of the chief clerk and no challenge of his good faith throughout the transaction to emphasize the fact that under the law, where one in authority stands by with knowledge of a claim for pay for services and permits the performance of said services without a protest, he may not claim all the benefits thereof and disavow the responsibility to pay. This, I think, is axiomatic, and applies with added force when one party is indispensably in need of the service and the other party is insisting that no express contract exists extracting [exacting] it. It has been long since adjudicated that a Government contract is subject to the same rules of construction as a contract between private individuals."

As to the contractual authority of the Director of Telephones for the War Department, while it is true

the Court below found that he "had no power to bind the Government in the matter of contract and was not in any sense a contracting officer", (R. 20, Finding XII), yet it also found, in the same finding, that he received his appointment from the Secretary of War, had immediate charge of the telephone service and traffic of the Department; that he was there to get the best service as quickly as possible, and the Secretary of War supported him in that; and that there were items of work or installations which were ordered for the telephone service of the Department by him, without any written order given at the time, but payments for which were subsequently made.

As to this official, the Director of Telephones for the War Department, the Chief Justice of the Court below, in his dissenting opinion (R. 39) said:

> "He (Scovell) and he alone was the actual participant put forward by the department to deal with the plaintiff. He reported directly to the Secretary of War, and so far as this record discloses this transaction is the single one where Scovell's authority to act has been questioned. The findings recite (Finding XII) that he had no contractual authority and then proceed to recite that he did without written orders from the Secretary of War or the chief clerk order this plaintiff to do extra work and make extra installations, for all of which the department authorized payments to be made."
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> "It is difficult to conceive a right to hold one out to the public with authority to act, ratify a number of acts involving authority to thus act, and then after a transaction has passed to the point of execution and all the benefits of the same have been accepted and enjoyed, disavow responsibility to pay therefor."

Since, as hereinbefore discussed, the switchboard here involved did not fall within the provisions of Section 4 of the Act of June 17, 1910, nor of contracts made by the authority of that Act, to hold, as did the majority opinion of the Court below, that the contract sued upon was made without authority, and that, "in this case there is a complete absence of proof of authority," is equivalent to holding that there was no one in the Department of War except the Secretary of War himself who had authority to contract for a thing then absolutely indispensable to the efficient conduct of the business of the Department, at a time of such an emergency and crisis and when the Secretary of War was laboring under the tremendous burdens of his office.

Furthermore this holding entirely ignores the fact that the telephone company submitted plans to the Secretary of War for the purpose of securing approval of the proposed switchboard and equipment and its layout in the proposed building with relation to the floor space, before placing a final order for the construction thereof (R. 22, Finding XIII), and also the fact that the claim of the telephone company for compensation in connection with this board was rendered the War Department May 19, 1919, and referred by the Secretary of War to the Board of Contract Adjustment, so that it thus clearly appears in the findings that the War Department continued to use the board for more than a year and a half after the company's claim for compensation came before the Secretary of War for action (R. 23, 28, Findings XV and XXVIII). Even therefore if there were lack of full authority on the part of the Assistant to the Secretary of War and Chief Clerk of the War Department and also of the Director of Telephones for the War Department to bind the Govern-

ment contractually in this matter at the outset, which, however, we do not admit, still the fact that the War Department continued to retain and enjoy the benefits of the contract after notice to the Secretary of War himself of the claim of the company for compensation, amounts to a ratification of the contract by the Secretary of War, as to whose authority there can be no reasonable question.

In support of its holding as to lack of authority, the Court below, in its opinion (R. 31), cites two decisions of this Court, *Jacob Reed's Sons v. United States*, 273 U. S., 200, 202, and *Baltimore & Ohio Railroad Co. v. United States*, 261 U. S., 592, 596. As stated by the Court below, these cases both hold that it was not the purpose of the Dent Act to give a remedy upon contracts made without authority; but neither of these cases is applicable to the present case. As this Court said of the contract claimed upon in the *Reed* case (p. 202), "it is doubtful whether even express authorization could, under the then existing statutes, have conferred upon any one the power to make the contract which the plaintiff has attempted to prove," while, in the *Baltimore & Ohio* case, which involved a claim for the construction of certain barracks, the findings established, not only that no order by anyone having authority had been given, but that there had been no order or request whatever for the construction of the barracks and that the subject of compensation was never mentioned until after the barracks were completed. A case much more in point, which is cited in the dissenting opinion below, though not in that of the Court, is that of *Swift & Co. v. United States*, 270 U. S., 124, in which Mr. Chief Justice Taft delivered the opinion of this Court. The present case

is a stronger one for the claimant than was the *Swift* case.

Point D.

The special findings of fact, as found by the Court below, set forth facts from which a contract is implied in fact to compensate the telephone company.

As heretofore discussed, the switchboard here involved, at the time of the negotiations therefor with the officials of the War Department, was not covered by the existing supply contract or any other contract then in force.

The findings of the Court below show definitely that, before the installation of the switchboard, notice was given by the proper official of the telephone company to the responsible officials of the War Department, as just discussed under Point C, that the government would be expected to pay the cost of the switchboard less salvage. While the officials of the War Department did not make any express promise, either oral or written, to make such payment, they did clearly evidence their acceptance of this proposition or offer of the telephone company by approving the plans submitted by the telephone company, showing the character of the proposed equipment and its layout in the building which the government undertook to construct especially to house it, and which it did so construct, by the approval and acceptance of the switchboard as thereafter installed, and by its use for some two years and a half, and for over a year and a half after the claim of the telephone company for compensation therefor had been filed with the Secretary of War and by him referred to the Board of Contract Adjustment.

This, simply stated, constituted an offer by the tele-

phone company to furnish certain equipment upon certain terms, and an acceptance and use of that equipment by the War Department, acting through its responsible officials. From this a contract to pay is implied in fact, and so much the more clearly and strongly so where the offer was not merely accepted, but where all of the benefits of the contract were accepted and enjoyed by the Department.

The only possible basis, it seems to us, upon which the Court below, in the majority opinion, could have reached the conclusion that there were no facts found from which a contract could be implied in fact, is due to the finding that there was no express promise on the part of the War Department officials to compensate the telephone company for the switchboard. Such a holding is absolutely contrary to the fundamental and established principles of the law of implied contracts, which is too well settled, in this regard, to require the citation of authorities.

But even if the facts in this case had been less conclusive in showing the actual contract, nevertheless under the liberal construction which is given pleadings in the Court of Claims, the telephone company would still be entitled to recover, on a *quantum meruit*, reasonable compensation, measured at least by the cost of this specially constructed switchboard, less salvage, or by some larger measure. *Clark v. United States*, 95 U. S., 539.

Point E.

When the War Department accepted, and even after claim for compensation had been filed with the Secretary of War, continued to retain all of the benefits of the contract, it cannot disavow its burdens.

A switchboard of so large a size and unusual character as that here involved, installed in a building especially designed and constructed to house it, and supplying the pressing needs of a great department of this government in the time of such an emergency, is entirely different from some minor article which might have been ordered, without authority, by some minor official, and used, in a way, for the benefit of the government, but without the knowledge, assent or approval of any responsible official.

All of the responsible officials of the War Department knew of the installation and use of this switchboard, and must have known that it was not in anywise within the contemplation or scope of the general supply contract then in force, and yet the switchboard was approved, accepted and used so long as the war emergency made it necessary or desirable for the service of the Department.

In the face of these facts, however, the Court below, by its majority opinion, has held that the Government was entitled to accept all of the benefits of the contract, and then disavow the burdens, as though the law of contracts were, in this case, inapplicable to the United States. Such, however, is not the case, as the Court of Claims itself has previously recognized. Thus, in the case of *Ford vs. United States,* 17 Court of Claims, 60, 75 to 76, the Court said:

> "In applying the law of agency to the transactions of the government, it has not been the purpose of the Supreme Court, nor of this, to shackle or curtail the lawful and reasonable powers of the executive. Both courts have sought with great unanimity of decision to uphold the necessary discretion of the heads of the executive departments and other responsible officers of the government, but at the same time so to apply the law that subordinate and irresponsible agents should not bring upon the government an unauthorized indebtedness through the medium of implied contracts. In this application of the law of agency to the affairs of the government, the courts have also recognized the principle of ratification, and have held that ratification by the head of an executive department, or other responsible officer, could render a contract effective and valid which otherwise would be unauthorized and inoperative."

With the facts which were before the responsible officials of the War Department, it seems utterly unreasonable to us, and to show little regard for the intelligence we can properly conclude they possessed, to assume that they expected to receive the benefits of this switchboard without being required to pay the cost thereof less salvage, which they had been told by the telephone company would be expected.

As was said by the Chief Justice below in his dissenting opinion (R. 40):

> "Surrounding the whole case, conceding arguendo that the findings are in all respects accurate, there exists, it seems to me, a clear, irrefutable inference and understanding that what the plaintiff was called upon to do was most extraordinary, unusual, and not within the customary and

established course of dealing between the parties during all previous years. The defendant was fully aware of this fact, and it is difficult to conclude that under all the circumstances of the case the defendant expected to receive the service rendered without paying therefor."

In view of such a situation, it is the more unconscionable that the government should be allowed to retain the benefits of this contract and escape the obligation to make compensation therefor.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors committed by the Court of Claims, including, among others, that of erroneously construing a Federal statute, to-wit the Act of June 17, 1910, *supra*, may be corrected; and that, to such an end, a writ of certiorari should be granted, and that this Court should review the decision of the Court of Claims, and finally reverse the same.

Respectfully submitted,

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